Lau Yau Chai v Johore Mining & Stevedoring Co Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION R1–25–101–94
ABDUL KADIR SULAIMAN J
19 NOVEMBER 1996

Labour Law *— Employment — Whether person a 'workman' — Managing director cum chief executive officer of company — Managing director was the brain and directing mind of company who determined and formulated company's policies — Whether managing director was workman of the company within the contemplation of the Industrial Relations Act 1967 — Industrial Relations Act 1967 s 2*

Labour Law *— Employment — Termination of directorship — Managing director to cease to be such if he ceases to be a director of company — Managing director also to assume the post of chief executive officer of company — Applicant failed to get re-appointment as a director and was stripped off positions as managing director and chief executive officer — Whether applicant held both positions simultaneously — Whether even upon ceasing to be managing director, applicant should remain as chief executive officer — Whether applicant was dismissed as chief executive officer without just cause and excuse*

The applicant was the managing director of the respondent. It was stated in his letter of appointment that the managing director was the chief executive officer of the respondent. By art 85 of the articles of association of the respondent, the managing director shall ipso facto and immediately cease to be such if he ceased to hold the office of director for any cause. On 12 May 1992, the respondent held its annual general meeting ('the AGM'). At the AGM, the applicant was not re-elected as a director of the respondent. The new board of directors in the same meeting abolished the position of managing director. The applicant was subsequently informed that he had ceased to be the managing director of the respondent as at 12 May 1992 and that he had also ceased to be its chief executive officer as of the same date. The applicant claimed that he was unjustly dismissed. The Minister referred the case to the Industrial Court under s 20 of the Industrial Relations Act 1967 ('the Act'). The Industrial Court held, on the basis of a preliminary objection raised by the respondent, that the applicant was not a workman within the contemplation of the Act and therefore the court had no jurisdiction to entertain the case ('the award'). Hence, the applicant applied to the High Court for an order of certiorari to quash the award and for an order of mandamus directing another division of the Industrial Court to rehear the reference by the Minister. The applicant submitted that the Industrial Court had fallen into error by failing to take into account that, at the material times, the applicant held two positions simultaneously, ie as the managing director and chief executive officer of the respondent; therefore, when the applicant was removed as the managing director on 12 May 1992, he ought to have remained as the chief executive

officer of the respondent. Therefore, his dismissal as the chief executive officer of the respondent was done without just cause and excuse.

Held, dismissing both applications:

(1) A person who represented the directing mind and will of the company, the very ego and the centre of the personality of the company, was not a workman within the meaning of s 2 of the Act, for he was being placed in a position to determine and formulate the company's policy. It was for the Industrial Court to decide as a preliminary issue upon any objection raised as to whether a particular claimant was or was not a workman in order to clothe it with the jurisdiction to determine the merits of the claim.

On the facts of this case, the applicant was not a workman within the contemplation of the Act. The applicant when he was holding the position of managing director for the respondent was the brain and directing mind of the respondent. This disqualified him from being a workman under the Act (see p 787H–I, D); *Inchcape Malaysia Holdings Bhd v Gray & Anor* [1985] 2 MLJ 297 followed, *Koperasi Serbaguna Sanya Bhd Sabah v Dr James Alfred* [1990] 1 ILR 252 and *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 distinguished.

(2) It was expressly stated that the managing director was also the chief executive officer of the company. Therefore, it was by virtue of his appointment as managing director that the applicant was the chief executive officer. It followed that the moment he was no longer the managing director, he was also no longer the chief executive officer of the respondent. In the circumstances, it was wrong to construe the applicant as holding two posts independently of one another (see p 785E–G); *Associated Air-Pack Industrial Sdn Bhd v Chin Yoon Loy* (1992) 1 ILR 180 distinguished.

[Bahasa Malaysia summary

Pemohon merupakan pengarah urusan penentang. Adalah dinyatakan dalam surat pelantikannya bahawa pengarah urusan adalah ketua pegawai eksekutif penentang. Menerusi perkara 85 perkara-perkara persatuan penentang, pengarah urusan secara ipso facto dan dengan serta-merta tidak lagi memegang jawatan pengarah urusan jika dia tidak lagi memegang jawatan pengarah atas apa-apa sebab. Pada 12 Mei 1992, penentang telah mengadakan mesyuarat agung tahunan ('MAT'). Di MAT, pemohon tidak dilantik semula sebagai seorang pengarah penentang. Lembaga pengarah yang baru di mesyuarat yang sama telah membubarkan jawatan pengarah urusan. Pemohon kemudiannya diberitahu bahawa dia tidak lagi menjadi pengarah urusan penentang pada 12 Mei 1992 dan bahawa dia juga telah diberhentikan sebagai ketua pegawai eksekutif penentang pada tarikh yang sama. Pemohon mendakwa bahawa dia telah dipecat secara

tidak adil. Menteri telah merujuk kes itu kepada Mahkamah Perusahaan di bawah s 20 Akta Perhubungan Perindustrian 1967 ('Akta tersebut'). Mahkamah Perusahaan memutuskan, atas dasar bantahan permulaan yang dibuat oleh penentang, bahawa pemohon bukanlah pekerja dalam maksud Akta tersebut dan maka mahkamah tidak mempunyai bidang kuasa untuk melayan kes itu ('award tersebut'). Justeru itu, pemohon membuat permohonan kepada Mahkamah Tinggi untuk suatu perintah certiorari bagi membatalkan award tersebut dan untuk suatu perintah mandamus yang mengarahkan bahagian Mahkamah Perusahaan yang lain supaya mendengar semula rujukan oleh Menteri. Pemohon berhujah bahawa Mahkamah Perusahaan telah membuat kesilapan kerana gagal mengambil kira bahawa, di masa material, pemohon memegang dua jawatan serentak, iaitu sebagai pengarah urusan dan ketua pegawai eksekutif penentang; oleh itu, apabila penentang diberhentikan sebagai pengarah urusan pada 12 Mei 1992, dia sepatutnya kekal sebagai ketua pegawai eksekutif penentang. Oleh yang demikian, pemecatannya sebagai ketua pegawai eksekutif penentang telah dilakukan tanpa sebab atau alasan yang munasabah.

Diputuskan, menolak kedua-dua permohonan:

(1) Seseorang yang mewakili minda dan semangat yang mengarah sesebuah syarikat, satu-satunya ego dan pusat personaliti syarikat itu, tidak merupakan seorang pekerja dalam maksud s 2 Akta tersebut, sebab dia diletak dalam kedudukan untuk menentu dan merumuskan polisi syarikat. Mahkamah Perusahaan harus menentukan sebagai bantahan permulaan atas mana-mana bantahan yang dibangkitkan sama ada sesuatu pihak yang menuntut adalah atau bukan seorang pekerja supaya dapat diberikan bidang kuasa untuk menentukan merit tuntutan.

Atas fakta kes ini, pemohon tidak merupakan seorang pekerja dalam maksud Akta tersebut. Ketika memegang jawatan pengarah urusan untuk penentang, pemohon adalah pemikiran dan minda yang mengarah penentang. Ini mengecualikannya daripada tafsiran seorang pekerja di bawah Akta tersebut (lihat ms 787H–I, D); *Inchcape Malaysia Holdings Bhd v Gray & Anor* [1985] 2 MLJ 297 diikut, *Koperasi Serbaguna Sanya Bhd Sabah v Dr James Alfred* [1990] 1 ILR 252 dan *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 dibeza.

(2) Adalah dinyatakan secara nyata bahawa pengarah urusan juga merupakan ketua pegawai eksekutif syarikat tersebut. Oleh yang demikian, pemohon menjadi ketua pegawai eksekutif melalui pelantikannya sebagai pengarah urusan. Ini bermakna bahawa pada ketika dia tidak lagi menjadi pengarah urusan, dia juga tidak lagi menjadi ketua pegawai eksekutif. Dalam keadaan ini, adalah salah untuk mengatakan pemohon memegang dua jawatan yang bebas daripada satu sama lain (lihat ms 785E–G); *Associated Air-Pack Industrial Sdn Bhd v Chin Yoon Loy* (1992) 1 ILR 180 dibeza.]

Notes

For cases on employment, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 595–914.

Cases referred to

Associated Air-Pack Industrial Sdn Bhd v Chin Yoon Loy [1992] 1 ILR 180 (distd)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (distd)

Inchcape Malaysia Holdings Bhd v Gray & Anor [1985] 2 MLJ 297 (folld)

Koperasi Serbaguna Sanya Bhd Sabah v Dr James Alfred [1990] 1 ILR 252 (distd)

Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351 (refd)

Legislation referred to

Companies Act 1965 Form 45
Industrial Relations Act 1967 s 20

B Lobo (*Lobo & Associates*) for the applicant.
N Sivabalah (*Shearn Delamore & Co*) for the respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: This is an application by Lau Yau Chai, the former managing director of the respondent company for an order of certiorari to quash the Industrial Court Award No 374 of 1994 ('the award') which held that he was not a workman within the definition contained in the Industrial Relations Act 1967 ('the Act'), and for an order of mandamus directing another division of the Industrial Court to rehear the reference by the Minister under s 20 of the Act. The award came about as a consequent of a preliminary objection raised before the Industrial Court by the respondent that the applicant is not a workman under the Act.

The reference by the Minister to the Industrial Court arose out of the alleged dismissal of the applicant by the respondent, which according to the applicant, took place on 14 May 1992. The applicant joined the respondent company in 1977 as a corporate assistant. However, in its Form 45 to the Companies Act 1965 dated 6 May 1980 (exhibited at p 84 of the record), the applicant expressed his consent to act as the company director of the respondent. Thus by that time, he was a director of the respondent. Then, with effect from 1 January 1983, the respondent appointed him as its deputy managing director and in July 1983 he was appointed as the managing director. This is evidenced by a letter from the respondent to the applicant (exhibited at p 20 of the record). Attached to the letter is the job description of the managing director. Under the

heading 'General description of job', it is stated therein that the managing director is the chief executive officer of the respondent. By art 85 of the articles of association of the respondent, the managing director shall ipso facto and immediately cease to be such if he ceases to hold the office of director for any cause. By art 93, 'until otherwise determined by the company in general meeting, all the directors shall retire from office at every annual general meeting of the company'. But a retiring director shall be eligible for re-election and shall act as a director throughout the meeting at which he retires.

On 12 May 1992, the respondent company held its AGM. At this meeting, in pursuance to art 93, the applicant and other directors of the respondent offered themselves for re-election. Unfortunately, the applicant was not re-elected by the AGM as a director. Therefore, by operation of art 85 the applicant ceased to be the respondent's managing director ipso facto and with immediate effect. Therefore, as there was no person holding the position of a managing director in the respondent's company, the newly elected board of directors of the respondent in the evening of the same day held a meeting and resolved to abolish altogether the position of a managing director in the respondent company. Now that the post of managing director was abolished by the new board and the applicant was no longer a managing director owing to his failure to be re-appointed as a director, someone else has to be designated as the chief executive officer of the company. To this end, the new board of directors of the respondent at the same meeting held on 12 May 1992 also resolved that one of them be appointed as the executive deputy chairman/chief executive officer of the respondent company.

Consequent upon the resolutions of the new board of directors, the chairman of the respondent wrote a letter to the applicant on the same day as follows:

> Dear Mr Lau,
>
> Re: Abolishment of the post of managing director
>
> This is to inform you that the board of directors at its meeting on 12 May 1992 has decided to abolish the post of managing director. At the annual general meeting held on the same day, you were not elected a director of Johore Mining & Stevedoring Co Sdn Bhd. By virtue of this, you would cease to be the managing director of the company with immediate effect.
>
> You are hereby requested to hand over all office-keys, safe combination, files, documents and records belonging to the company and to deliver the company car allotted to you to the chairman of the management committee by 1700 hrs today.
>
> In respect of the company household items in your house, the company is offering them to you to purchase at a price to be agreed by both parties.
>
> I take this opportunity to thank you for your services to the company and wish you every success in your future undertakings.
>
> Yours faithfully,
> Johore Mining & Stevedoring Co Sdn Bhd
> Sgd: Chairman, Board of Directors

By coincidence, on the same day after the AGM, the applicant wrote to the company as follows:

> Dear Sirs,
>
> I refer to the company's annual general meeting this morning where I was not re-elected as a director of the company and consequently ceased to be the managing director.
>
> When I returned to the office this afternoon after the AGM, I was shocked and surprised that I had been locked out of my office room. My attempt to seek clarification about my position in the company was to no avail.
>
> Under the circumstances, I am of the view that the company is driving me out of my employment. If I am not correct in this view, please revert to me in writing on or before 14 May 1992 as to my position and function in the company, failing which I will have no alternative but to consider myself dismissed by the company with effect from the same date, ie 14 May 1992.
>
> Yours very truly,
> Sgd: YC Lau
>
> Copies to:
> The Board of Directors
> Johore Mining & Stevedoring Co Sdn Bhd
> Johor Bahru.

The following day, on 13 May 1992, the newly appointed executive deputy chairman on behalf of the respondent company wrote the following to the applicant:

> Dear Mr Lau,
>
> Re: Discontinuation of the post of chief executive officer
>
> Our letter to you dated 12 May 1992 with regard to the abolishment of the post of managing director refers.
>
> Please be informed that you have ceased to be the managing director as of 12 May 1992. You have also ceased to be the chief executive officer of the company as of the same date.
>
> Yours faithfully,
>
> Sgd: Hashim Othman
> Executive Deputy Chairman
> Board of Directors

The letter of 12 May 1992 from the chairman received the response from the applicant by his letter dated 14 May 1992 as follows:

> Dear Sirs,
>
> Re: Dismissal
>
> I refer to my letter of 12 May 1992 and the chairman's letter of the same date (which appears to have crossed in delivery).
>
> In view of the contents of para 2 of the letter, I have no alternative but to consider myself unjustly dismissed as an employee/workman of the company with effect from today.

I have handed over certain company properties and will be handing over the remainder (as required) *under protest and without prejudice* to my rights over my unjust dismissal by the company.

I do not propose to purchase any household items as suggested by the company.

Yours faithfully,
Sgd

Thus, the issue arising out of the events at the AGM and the various correspondence that ensued after that is whether by failing to be elected as a director at the said AGM of 12 May 1992, the applicant had automatically ceased to be the respondent's managing director. If he has so ceased to be its managing director, whether his position as an executive officer of the respondent also cease to exist together with his position as the managing director. As the function of the Industrial Court under a reference such as this is of a limited scope in as far as its threshold jurisdiction is concerned and in the light of the preliminary objection raised by the respondent, the court is precluded from resolving this issue. Thus before embarking on the merits of the reference, the Industrial Court was correct in resolving its threshold jurisdiction as a preliminary issue.

Before the Industrial Court, on the basis of the preliminary objection that the applicant is not a workman within the contemplation of the Act, the learned counsel for the respondent cited *Inchcape Malaysia Holdings Bhd v Gray & Anor* [1985] 2 MLJ 297 in support. Salleh Abas LP said at p 300:

> Surely, common sense tells me that a director and a workman are poles apart and not synonymous. A director occupies a special position in the company and has different type of responsibilities from those of an ordinary employee of the company. By specifying in the contract that the respondent was employed as a director, the parties to the contract must have intended that the respondent was not to be regarded as a 'workman'.

In its award, the Industrial Court held at p 293 of the record:

> Adopting the criteria enunciated in *Inchcape*'s case referred to above and after considering the job function, duties and responsibilities of the claimant up to 12 May 1992, together with the submissions of the learned counsel for both parties, I hold that the claimant is not a 'workman' within the definition of the term in the Act. I find as a fact that the claimant ran the company as its brain and directing mind at all material times even after the management committee was formed and he continued to be the managing director and a member of the management committee. Consequently, the preliminary objection by the company is sustained and I hold that I have no jurisdiction to go into the merits of the case.

In the award which appears from pp 280–293 of the record, the court discussed in detail *Inchcape*'s case by citing the various relevant passages from the report in order to arrive at the decision that the applicant was not a workman. At p 291 of the record, the court listed the functions carried out by the applicant when he was holding the position of the managing

director for the respondent to support its findings that the applicant was the brain and directing mind of the respondent so as to disqualify him from being a workman under the Act. There is nothing I can find in the decision of the Industrial Court that it is absurd or irrational.

Next, the said award was challenged on the ground that in making it the Industrial Court had failed to take into considerations the many aspects of the learned counsel's submissions before it, including the citing of many case authorities distinguishing the applicant's case with that of *Inchcape*, as no mention was made of them in the award. The submission before me is that by not doing so, the court had committed an *Anisminic* (*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147) error. In *Inchcape*, Mr Gray was employed by Inchcape as director of two of Inchcape's subsidiary companies. The Supreme Court held that in order to be a workman under the Act, the person must be employed as a workman. If he is employed in any other capacity, he cannot be a workman. As Mr Gray in that case was employed as a director and the parties must have intended that he was not to be employed as a workman, he was not to be regarded a workman within the Act. Before the Industrial Court, the learned counsel for the applicant submitted that the *Inchcape* principle does not apply to the present case because in this case, no third party was involved as compared to the involvement of the subsidiary companies in Inchcape. That aspect of the matter was not expressly mentioned in the award. Hence, he takes it that the Industrial Court had failed to consider that aspect of the matter. Though it is true that no such express mention was made by the Industrial Court in the award, it is implicit in the award itself, because the fact as found by the Industrial Court was that the applicant was at all material times employed as a managing director. At p 6 of the award ('exh LYC 6'), the Industrial Court says:

> It is not disputed by the company [the respondent] that until 12 May 1992, the claimant [the applicant] was an employee of the company. Learned counsel for the company in his submission conceded that the claimant was an employee of the company by virtue of the fact that the claimant was employed as a managing director but that he was not a 'workman'. The issue for determination by me now is whether the claimant, though an employee of the company, was in fact and in law a 'workman' within the definition of the term 'workman' in the Act.

The Industrial Court then proceeded to consider the various passages in *Inchcape* and continued at p 13 thus:

> Learned counsel for the claimant urged me to ignore the fact that the claimant was the managing director but to consider only that the claimant was the chief executive officer of the company. However, I find as a fact that the claimant was the managing director at all material times and that only in this capacity as the managing director was he considered to be the chief executive officer. Learned counsel also submitted that when the company formed a management committee in February 1992, the claimant's position was diminished and that he no longer thereafter had the powers of the managing director. I find that even though a management committee had been established, the claimant was still the managing director of the company

and was also a member of the management committee. The committee also reported to the board of directors of the company. The claimant continued to function as the managing director.

In the circumstances, it is hard to see that the Industrial Court had failed to consider that aspect of the learned counsel's line of submission. Although the facts in *Inchcape* spelt out the involvement of a third party, the principle there laid down is that, in order for a person to be workman he must be employed as such. However, in this case, the applicant was employed by the respondent, not as a workman but in another capacity, which is in the capacity of a managing director. Therefore, following from there, it is proper to conclude that the parties to the contract must have intended that the applicant was not to be regarded as a workman. Thus, I find no merit in the contention of the learned counsel for the applicant.

In the course of his submission before the Industrial Court, the learned counsel cited my own decision when I was sitting in the Industrial Court in *Koperasi Serbaguna Sanya Bhd Sabah v Dr James Alfred* [1990] 1 ILR 252 as a persuasive authority to distinguish the applicant's case with that of *Inchcape*. Before me in this proceedings, the learned counsel for the applicant attacked the award in that the Industrial Court made no comment at all about the case. In that case, I distinguished *Inchcape* for the reason that the respondent there was not employed as a member of the board of directors of the Koperasi but was employed as a salaried general manager. However, while in such employment, he was appointed by the board with the consent of the Registrar of Societies to sit in the board. Later, he was dismissed from his employment as the general manager and the matter was referred to the Industrial Court. Again, it is clear from the said decision as to how *Inchcape* was distinguished, and looking at the way the award was made, I do not think that the Industrial Court should be blamed for not commenting on the case. Also, the learned counsel complained that the Industrial Court made no comment in the award on *Associated Air-Pack Industrial Sdn Bhd v Chin Yoon Loy* [1992] 1 ILR 180 upheld by the High Court in Originating Motion No 2–25–47–92 which again distinguishes *Inchcape*. In that case, the claimant was appointed as a managing director for the respondent. In applying the control test, the Industrial Court held that the documentary evidence tendered showed that the claimant was the chief executive officer of the respondent. Whilst in the present case before me, the claimant was not employed as a chief executive officer. He was so only by virtue of his holding the post of a managing director. This is clearly reflected in the reasons given by the Industrial Court in the award. In support of his contention that the Industrial Court had fallen into error under this ground, the learned counsel cited the dicta of Lord Diplock in *Council of Civil Service Union & Ors v Minister for the Civil Service* [1985] AC 374 concerning the issues of 'illegality' and 'irrationality', cited in *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351 at p 355.

The learned counsel submitted that the Industrial Court had fallen into error by failing to take into account that, at the material times, the applicant held two positions simultaneously, ie as the managing director

A and chief executive officer of the respondent company. It is the contention of the learned counsel that when the applicant was removed by the letter of 12 May 1992 as the managing director for failure of re-election as a director at the AGM held that day, he should remain as the chief executive officer of the respondent. His dismissal as the chief executive officer by the B letter of 13 May 1993 was therefore done without just cause and excuse. The Industrial Court in its award at p 292 of the record has this to say on the point:

> Learned counsel for the claimant urged me to ignore the fact that the vlaimant was the managing firector but to only consider the vlaimant as the chief executive officer of the company. However, I find as a fact that the C claimant was the managing director at all material times and that only in this capacity as the managing director was he considered to be the chief executive officer. He did not have two positions in the company.

Was the Industrial Court right in its findings? If it was wrong, then it could prima facie be said to have reached the decision irrationally or perversely D in as far as the applicant as the chief executive officer was concerned because its arriving at the decision that the applicant was not a workman was in relation to the applicant being the managing director of the respondent. It is my view that the Industrial Court was correct in coming to such a conclusion as the job description attached to the letter of offer to E the applicant as the managing director explains all the terms as to the position of the applicant as a managing director of the respondent. Under the heading 'General description of job', it is expressly stated that the managing director is the chief executive officer of the company. Therefore, it is by virtue of his appointment as a managing director that the applicant is the chief executive officer. It follows thereon that the moment he is no F longer the managing director, he is also no longer the chief executive officer of the respondent. The position of the chief executive officer with the respondent at the material times did not constitute a separate appointment for the applicant as so found by the Industrial Court in *Chin Yoon Loy*'s case. In the circumstances, it is wrong to construe the applicant as holding two posts independently of one another. That explains the G existence of the two letters of 12 May 1992 and 13 May 1992 from the respondent. In the circumstances, the Industrial Court was right in holding that the applicant was the managing director at all material times and that only in this capacity as the managing director was he considered to be the chief executive officer. Therefore, the Industrial Court did not commit any H error that would attract certiorari proceedings. It may well be that if the position of the chief executive officer is a distinct appointment, he may not be the brain and directing mind and will of the respondent company. But this is not the case here. In that light, I cannot find any irregularity or irrationality in the award. Hence, this ground has no merit.

I Next, it is submitted by the learned counsel that the Industrial Court had committed a patent jurisdictional error in that it took other matters into consideration other than that contained in the reference to it by the Minister under s 20(3) of the Act. According to the reference, the date of the dismissal of the applicant was given as 14 May 1992 which the

Industrial Court was well aware of. However, according to the award, the court was concerned with the date 12 May 1992 and had held that at all material times the applicant was not a workman. Having considered the award in totality, I cannot agree with the submission so made that the court had fallen into error in the sense that it had considered irrelevant matters in making the award. The date 14 May 1992 was the date alleged by the applicant as being the date he was dismissed based on his two letters mentioned above, respectively of 12 May 1992 and 14 May 1992. But as far as the respondent is concerned, the applicant was no longer its managing director as of 12 May 1992 and consequently was also no longer its chief executive officer as of the same date. This is evidenced from the two letters mentioned earlier (ie dated 12 May 1992 and 13 May 1992) from the respondent to the applicant following the decision arrived at the AGM held in the morning of 12 May 1992. Therefore, the cut-off point for the Industrial Court to consider for purpose of determining its threshold jurisdiction must be 12 May 1992 and not 14 May 1992 as contended by the applicant. Thus, I cannot see any patent jurisdictional error being committed by the court as so contended by the applicant.

It is further contended by the learned counsel that the Industrial Court had committed error by concluding that the applicant was not a workman on the material date of the dispute in the light of the evidence by the witness for the respondent which appears at p 11 in exh SG1, which is the notes of proceedings before the Industrial Court. The witness, COW1 was referred to pp 12–15 of exh CO3A wherein he testified:

> I agree that the managing director cannot do anything without the approval of the board. The board supervises as stated in the memorandum and article of association. Usually, the board is chaired by the Chairman. The managing director is answerable to the Chairman and the board.

Further at p 16, the witness testified:

> [Referred to p 51 of CL6] This letter is dated 16 April 1992 after the new shareholders had taken over. This was from the Chairman of the management committee, En Hashim Othman. This is to the mine manager without a copy to the claimant. Prior to this, it was the claimant who issued this type of letter.

Reference was also made to p 17 of the notes of proceedings wherein the witness testified:

> [Referred to CO18] I agree that, with effect from 17 February 1992, the managing director had to report to the management committee.

Reference was then made to p 18 of the notes of proceedings wherein the witness testified:

> CO2–CO16 related to events before the new shareholders took over. They took over in February 1992. After February 1992, the claimant did not sign any letter appointing or terminating employees. After February 1992, the claimant did not sign any collective agreement on behalf of the company.

Lastly, reference was made to the evidence of the witness at p 20 thereof wherein he testified:

> I produce the minutes of the first management committee meeting on 2 March 1992 — CO23. I agree that under this, the chairman of the committee has the final authority on decisions made by the management committee. The chairman is Hashim Othman. The scope of function of the management committee is to implement policies and guidelines set by the board. In other words, the management committee is answerable to the board. Prior to this, the claimant as managing director was answerable to the board.

It is the contention of the learned counsel that from the evidence so much given by the witness for the respondent, it would clearly indicate that the applicant was a workman as from 17 February 1992 because the job function of the applicant was taken over by the management committee which scope is to implement policies and guidelines set by the board. While this may be so, it is in the evidence that the applicant was also a member of this management committee in the capacity as a director of the respondent. The fact is the applicant was a director right up to the time preceding the result of the AGM held on 12 May 1992. Being a director, he was a member of the board which is the brain and mind of the respondent company. As such, he cannot be considered as a workman (see the dicta by Salleh Abas LP in *Inchcape* cited above). In the circumstances, the contention lacks any merit.

However, the learned counsel in the course of his submissions cited *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 (FC). It is submitted that in that case (based on the dicta at p 380), the Federal Court did not follow *Inchcape*. However, upon the reading of the judgment in *Hoh Kiang Ngan*, it was clear that the Federal Court at p 380 was only giving its comment upon the facts of the case resulting in the Federal Court to conclude at p 391 as follows:

> We do not read the decision in *Inchcape* as deciding that the Industrial Court has no jurisdiction to decide whether a particular claimant is a workman. Instead, that decision should be read, as we read it, that a finding by the Industrial Court that a claimant is or is not (as the case may be) a workman within the Act is not conclusive and is subject to judicial review upon a motion for one or more of the prerogative orders. Viewed from this perspective, we find no error of principle in the passage in the judgment of Chang Min Tat FJ delivered in the earlier decision in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 that was adversely commented upon by Salleh Abas LP in *Inchcape*.

In the result, the principle laid down in *Inchcape* remained intact in the sense that a person who represents the directing mind and will of the company, the very ego and centre of the personality of the company is not a workman within the meaning of s 2 of the Act, for he is being placed in a position to determine and formulate the company's policy. It is for the Industrial Court to decide as a preliminary issue upon any objection raised as to whether a particular claimant is or is not a workman in order to clothe it with the jurisdiction to determine the merits of the claim. This decision of the Industrial Court is not conclusive and is subject to judicial review upon a motion for one or more of the prerogative orders. On the facts before the Industrial Court in respect of this complaint of the applicant

against the respondent, I do not find any error of law committed by the court in arriving at the decision in the award that the applicant was not a workman at all the material times. The applicant was not appointed as a director of the respondent but being elected as such by the general meeting of the respondent. He sat at the board of directors' meetings. He was appointed to be the managing director of the respondent by virtue of him being one of the directors of the respondent company and in that capacity he was also the executive director. The moment he is not re-elected at any AGM as a director, as happened during the AGM held on 12 May 1992, he automatically ceased to be the managing director pursuant to art 84 of the articles of association of the respondent. With that goes his ex-officio post of executive director of the respondent pursuant to the 'General description of job' enumerated in exh CO3.

In the circumstances, this application for certiorari by the applicant to have the award of the Industrial Court quashed must necessarily fail. That being the position, his application for mandamus to have his complaint referred to another division of the Industrial Court must also fail. I therefore, have both the applications of the applicant dismissed with costs to the respondent.

Applications dismissed.

Reported by Eugene Lee Hong Whye